

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF OPTOMETRISTS

IN THE MATTER OF :  
ALEXANDER J. MC GOWAN : Administrative Action  
LICENSE TO PRACTICE OPTOMETRY :  
IN THE STATE OF NEW JERSEY : FINAL DECISION AND ORDER

This matter was opened on the Board's penalty letter of April 10, 1991, later supplemented by the Board's letter of June 19, 1991. The penalty letter charged that respondent had caused an advertisement to be placed in newspapers circulating within the State of New Jersey, a copy of which is annexed hereto and made a part hereof. Said advertisement was alleged to violate N.J.A.C. 13:38-1.2c(6) in that it failed to make certain disclosures required by the cited regulation.

In response to a demand by the respondent, Marcus I. Barth, O.D. that a hearing be held, the Board held an evidentiary hearing at its regular meeting of October 23, 1991. Respondents Stuart S. Kolber, O.D. and Alexander J. McGowan have submitted statements to the Board indicating that they intend to be bound by the Board's determination following the evidentiary hearing afforded to Dr. Barth.

At the hearing the matter was presented to the Board by Deputy Attorney General Beatriz Valera-Schutz, and Dr. Marcus I. Barth appeared, pro se. Based upon its review of the record herein the Board hereby affirms its determination that said advertisement violates the above cited regulation. In accordance

with the Administrative Procedure Act, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about February 7, 1991 the annexed advertisement bearing respondent's name appeared in the Hunterdon County Democrat.

2. Said advertisement offers optometric services and ophthalmic goods and merchandise for sale.

3. Said advertisement sets forth a price to be paid for advertised contact lenses and fails to disclose the cost of a contact lens care kit either separately or as part of a package. Said ad is, therefore, subject to the required disclosures set forth in N.J.A.C. 13:38-1.2c(6).

4. Respondent submitted a letter from the Trentonian indicating that the advertisement in question, apparently also appearing in the Trentonian, should not have contained the following language:

Three pairs of Bausch & Lomb Soft Spherical  
Contact Lenses and one year supply of  
solutions \$93.00.

Since the language asserted to have been erroneously inserted did not in fact appear in the advertisement, the Board finds that the asserted error cannot be credited and that respondent was fully responsible for the advertisement as it appeared in the newspaper(s).

### CONCLUSIONS OF LAW

Initially it should be noted that the advertisement as appearing in the newspaper is at best confusing, and at worst materially misleading. In the first phrase the consumer is told that three pairs of Bausch & Lomb contact lenses, specifically identified, soft lenses and one year's supply of solutions will be \$93. In the second descriptive provision the consumer is told that if a purchase is made of one pair of Bausch & Lomb clear spherical single vision soft lenses (not specifically identified when compared to the first provision) another three pairs would be available for presumably an additional \$93 which would also include a year's supply of solutions. One is not told what the regular price is, and it is not at all clear what the intent of the advertiser is. The consumer must almost speculate as to whether for the expenditure of \$93 three pairs of lenses plus a year's supply of solutions will be received or, alternatively, which is more likely the case, whether the consumer must pay an undisclosed "regular price" and then an additional \$93 in order to receive three more pairs plus a one year's supply of solutions. In short, the textual statements are at a minimum, confusing and unclear. Respondent, therefore, is preliminarily admonished to more carefully and clearly disclose the material terms of goods and services offered for sale in the future.

Wholly apart from the above N.J.A.C. 13:38-1.2c(6) provides in relevant part:

When prices are set forth for ophthalmic goods and services for contact lenses, the

advertisement shall include, but not be limited to, the fee for the eye exam appropriate to a contact lens evaluation, the type of lens being offered, fitting instruction and follow up care. These items may be priced separately or as a combined package. If the cost of a contact lens care kit is not indicated as a separate item or as a part of a package, the following statements shall be set forth: "The proper maintenance of contact lenses requires sterilization, storage and cleansing in special containers and solutions, the cost of which is not included in this offer." In all advertisements which include a price for contact lens care kit, the type of kit shall be set forth. When the brand name and price of a contact lens is advertised, a statement shall be made to note that such lens may not be appropriate for all patients. (Emphasis added)

The regulation is clear as applied to the ad. The cost of a contact lens care kit is not indicated as a separate item or as part of a package, and, therefore the disclosure is required. The regulation's requirement to make disclosure concerning sterilization kits in the prescribed language has plainly been violated. Additionally, the advertisement also fails to contain a statement that the specifically described lens (Bausch & Lomb Medalist Spherical) may not be appropriate to all patients.

The required disclosures are intended to assure that consumers contemplating response to an advertisement are informed of the full cost of the contact lens package. The explicitly required disclosure assures that consumers are aware that additional equipment is necessary for the proper care and maintenance of contact lenses. By disclosing that particularly identified lenses may not be suitable, the consumer is placed on


notice that some other lens may have to be purchased (perhaps at an additional cost) should the advertised lens be optometrically inappropriate. On both counts, the ad plainly violates the regulation and deprives consumers of the important information contemplated by the regulation's underlying policy.

As respondent's name plainly appears in the advertisement, responsibility for its contents and compliance with applicable regulations attaches. Accordingly, since the initial allegations in the Board's penalty letter have been established,

IT IS on this 11<sup>th</sup> day of December, 1991

ORDERED:

1. Respondent shall pay a civil penalty in the amount of \$250.
2. Respondent shall pay costs in the amount of 0.
3. The payments ordered herein shall be made within ten (10) days following entry of this order by check made payable to the State Board of Optometrists and forwarded to the Board's Executive Director.

  
Leonard Strulowitz, O.D.